No. 98-1189

In The

Supreme Court of the United States

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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I. THE FIRST AMENDMENT DOES NOT PROHIBIT A PUBLIC UNIVERSITY FROM REQUIRING STUDENTS TO SHARE EQUALLY IN THE COSTS OF CREATING A *ROSENBERGER* FORUM.

A. Respondents' attempt to disavow their stipulation of viewpoint neutrality in the distribution of student fees lacks record support. This attempt should not detract from consideration of the question of whether the First Amendment requires that public university students be permitted to opt out of sharing the costs of creating a student fee forum.

This case presents the Court with the issue reserved in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, "whether an objecting student has the First Amendment right to demand a pro rata return to the extent the [student] fee is expended for speech to which he or she does not subscribe." 515 U.S. 819, 840 (1995).

Rosenberger held that a public university violated the First Amendment by discriminating on the basis of viewpoint in the distribution of student fees used to cover the printing costs of student publications. In this case, respondents did not challenge the University's segregated fee as failing to comply with *Rosenberger's* requirement of viewpoint neutrality. To the contrary, respondents explicitly stipulated that "[t]he process for reviewing and approving allocations for funding [to student groups] is administered in a

viewpoint-neutral fashion" (Stip. ¶ 12; Pet-Ap. 106a).[1] Consistent with their stipulation, respondents expressly acknowledged below that the University had created a non-spatial forum for speech through the imposition and distribution of the challenged fees. (Plaintiffs' Reply Br. at 3 (W.D. Wis. filed Oct. 27, 1996), R. 42).

Respondents did not submit a proposed finding of fact or conclusion of law in moving for summary judgment that the process of reviewing and approving fee applications discriminated on the basis of viewpoint (*see* J.A. 181-235). Furthermore, the record lacks any evidence that any student group has ever been denied a funding request, no matter its point of view. Neither the district court nor the court of appeals based its judgment on a finding of viewpoint discrimination in the distribution of fees.

Although respondents continue to argue that they are entitled to opt out of supporting the creation of a *Rosenberger* forum, their discussion of this central issue is clouded by their attempts to distance themselves from their stipulation of viewpoint neutrality.[2]

Respondents fail to identify any support for their view because no part of the record supports their assertion

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[1]The abbreviation "J.A." identifies the indicated pages from the parties' Joint Appendix; "Pet-Ap." refers to the Appendix to the Board of Regents' Petition for Writ of Certiorari; "R." identifies the district court docket entry by number (*see* J.A. 4-7).

[2]For example, respondents refer to the University's "substituting its governmental judgment for the accumulated judgment of individuals as to which ideas and groups to support, oppose, or to remain indifferent about," Resp. Br. at 27, to "all of [the University's] viewpoint-discriminatory policies restricting use of the mandatory fee," *id.* at 27-28, and to the University's "selective subsidies" and "financial subsidy to prop up a select subset of [student] groups." *Id.* at 29. At the top of page 31, respondents assert that which "groups receive money depends on . . . the value-based priorities of those controlling the student government."

that the funding system is not viewpoint neutral. The only arguable support for this claim consists of respondents' impression that liberal/left groups receive a larger portion of fees than other groups -- an assessment which lacks both rigor and significance, since there is no evidence that any group has been denied support because of its political perspective (*see* Resp. Br. at 28). Even if it were true, that some groups utilized the forum more than others, such a situation is hardly proof of viewpoint discrimination. It would be remarkable to observe the local chapter of the Industrial Workers of the World seeking parade permits more often than the local AFL-CIO Council. Respondents' impressionistic assessment is itself hard to credit in light of a record showing ASM events grants going not only to the Wisconsin Union Directorate for "Wake Up Little Susie," but also to the Federalist Society for debates on affirmative action and tort reform, to the Chinese Independent Union for movie showings, dance parties and the Chinese Spring Festival, to the Wisconsin Union Directorate for its Silent Film Festival and for the Winter Carnival, to the Wisconsin Black Student Union for showing a Million Man March Video, to the Women's Law Student Association for the Women's Law Conference, to the India Student Association for a sitar concert, to give just a few examples (J.A. 139-43). The same record shows regular or last minute ASM operations grants going to groups as diverse as the American Society of Landscape Architects, the Entomology Graduate Student Association, the Pre-Veterinary Association, the Pakistan Students Association, the Jewish Coalition, Minority Graduate Students in Business, the UW Scandinavian American Association, the International Socialist Organization, Asian Christian Fellowship, Delta Sigma Theta Sorority, Sigma Gamma Rho Sorority, the Hellenic Student Association and Students of Objectivism (J.A. 143-52), again to cite just a few examples.

The parties' stipulation of viewpoint neutrality, the absence of evidence of the denial of any group's application

for funding, and the evidence of diverse student speech funded through ASM grants, continue to present as the issue in this case, the mandatory funding of a student fee forum.

B. The compelling state interest standard is not the appropriate standard for determining whether a public university may require students to share in the costs of creating a student fee forum.

With respect to the question reserved in *Rosenberger*, respondents' basic argument rests on a refusal to differentiate among any of the gradations of compulsion and burdens of conscience in cases where there is some component of state compelled support for ideas with which an individual disagrees. To respondents, any such compulsion constitutes compelled speech, to be assessed solely under a compelling state interest standard.

This is not the law. The difference between compelled speech and compelled funding of other's speech was recognized in *Lathrop v. Dohonue*, 367 U.S. 820, 828 (1961), upholding Wisconsin's creation of an integrated bar. The Court described the requirement of bar membership as involving "compelled financial support of group activities, not with involuntary membership in any other aspect." *Id.*

Glickman v. Wileman Bros. & Elliot, 521 U.S. 457, 469-70 (1997), distinguished between actual compelled speech and compelled financial support for another's speech in a case challenging an assessment of members of California's fruit growing industry used for generic advertising. There, the Court held advertising assessments were not actual compelled speech because they did not require the businesses

> to repeat an objectionable message out of their own mouths, cf. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 . . . (1943), require them to use their own property to convey an antagonistic ideological message, cf. *Wooley v. Maynard*, 430 U.S. 705 . . . (1977), *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 18 . . . (1986) (plurality opinion), force them to respond to a hostile message when they "would prefer to remain silent," see *ibid.*, or require them to be publicly identified or associated with another's message, cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980).

Glickman, 521 U.S. at 471. Nearly all of the actual compelled speech cases cited in this passage are the cases respondents rely on for asserting the basic First Amendment principle of "No Coerced Funding of Others' Advocacy" (*see* Resp. Br. at 14-18).

A Majority of the Court in *Glickman* interpreted "*Abood* [*v. Detroit Bd. of Education*, 431 U.S. 209 (1977)], and the cases that follow it, [as] not announc[ing] a broad First Amendment right not to be compelled to provide financial support for any organization." *Glickman*, 521 U.S. at 471. The correct answer, dispositive here, is that being compelled to fund a forum -- whether spatial or non-spatial in character -- is fundamentally different from being compelled to finance the speech of a specific organization. The compelling governmental interest standard is not appropriate in every case touching on First Amendment values. For example, it did not provide the standard in the compelled forum case of *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). Even if respondents are correct that *Abood* and *Keller v. State Bar of California*, 496 U.S. 1 (1990), reflect an implicit requirement of the compelling state interest standard where mandatory assessments fund the speech of a single organization, that requirement will not

logically extend to mandatory funding of a limited public forum where any organization may participate in a university setting.

C. Compelled funding of a *Rosenberger* limited public forum should be treated the same as compelled funding of a traditional, spatial forum.

1. No principled difference exists between a university's requiring students to contribute to the costs of constructing a spatial forum, such as an auditorium, or to pay a fee for the costs of providing internet access to student groups, and its asking students to pay a small, uniform fee to defray some of the other costs associated with student expression. As *Rosenberger* recognized, a student fee system such as that found at the University of Virginia (and therefore that existing at the University of Wisconsin) "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." 515 U.S. at 830.

Respondents offer no persuasive justification or authority for treating a *Rosenberger* student fee forum differently. Their argument that an individual's beliefs should be shaped by his mind and conscience, rather than by the state (Resp. Br. at 26, citing *Abood*, 431 U.S. at 235), has no bearing with respect to public forums. The creation of a forum involves no state coercion that certain beliefs be held or espoused. Respondents write that "[b]y extracting money from students and distributing it to various campus groups, the University is substituting its governmental judgment for the accumulated judgment of individuals as to which ideas and groups to support, oppose, or to remain indifferent about" (Resp. Br. at 27). This is simply untrue. It is the free choice of individual student groups choosing to apply for grants that determines which ideas will be expressed. Respondents also suggest that the University is seeking to "restrict the speech of some elements of our society in order to enhance the relative voice of others" (Resp. Br. at 27,

quoting *Buckley v. Valeo*, 424 U.S. 1 (1976)). Respondents have not identified any restriction on student speech resulting from the distribution of modest grants to student organizations. Respondents appear to view the small reduction in their disposable income as a restriction on their ability to contribute money to groups they support (*see* Resp. Br. at 41), but their payment of tuition or their mandated support for University athletics and the University Health Center would constitute a comparable restriction. A similar argument was expressly rejected in *Glickman*, 521 U.S. at 470:

> Respondents argue that the assessments for generic advertising impinge on their First Amendment rights because they reduce the amount of money that producers have available to conduct their own advertising. This is equally true, however, of assessments to cover employee benefits, inspection fees, or any other activity that is authorized by marketing order. The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget.

Moreover, respondents' argument ignores their right to obtain a grant to facilitate the speech of their own student groups.

Respondents next argue, that while *Rosenberger* commands that there be "no viewpoint discrimination in distributing funds," *Abood* stands for the non-conflicting principle that there be "no compelled contributions" (Resp. Br. at 34). The two principles together yield respondents' symmetric slogan: "No exclusions due to viewpoints, no compulsions due to viewpoints" *(id.* at 35). Respondents' slogan, however, does not make sense and does not offer a

principled basis for decision of this case. In *Abood* and *Keller*, the union and bar dues were not distributed on a viewpoint neutral basis. This Court did not adopt respondents' symmetric standard, requiring the viewpoint neutral distribution of the assessments to member groups. Rather, it was the fact that only one point of view was being funded that required the recognition of an opt out right. In the instant case, the imposition of a single fee, payable by all students without regard to their beliefs, could not be more viewpoint neutral with respect to collection. The fee would therefore satisfy the second prong of respondents' slogan, "no compulsions due to viewpoints." In contrast, allowing students to opt out based on their views of the speech of individual groups would create a viewpoint-based collection system, in which groups with the greatest popular support would receive the most funds.

Respondents go on to argue that *Rosenberger* does not address the funding of the Wisconsin Student Public Interest Research Group (Wisconsin Student PIRG), which was approved by student referendum (*see* Resp. Br. at 36-37). We agree with respondents' general point that a process which funds a single group cannot be regarded as a *Rosenberger* forum. A union or bar association, when speaking on its own behalf, presumably reflects the views of a majority of its members. This does not render its speech viewpoint neutral, but instead requires, at a minimum, that dissenting members be able to opt out of funding non-germane, ideological or political advocacy. *See Glickman*, 521 U.S. at 471. The record does not contain evidence of GSSF funding being denied to a student group on the basis of viewpoint. However, the justification for requiring all students to support GSSF funding generally, and not simply that going to the Wisconsin Student PIRG, is not that they constitute a *Rosenberger* forum, but that they provide services to significant numbers of UW-Madison students. The important point here is that respondents' qualification regarding a single student organization's GSSF funding has

no bearing on the ASM funding going to more than one hundred student groups, which does result in the creation of a *Rosenberger* limited public forum.

According to respondents, it is irrelevant that the challenged fees fund one group or many (*see* Resp. Br. at 37). The argument does little more than beg the question, treating any financial support for expressive activities of student groups as compelled speech, even when distributed on a viewpoint neutral basis and for the purpose of facilitating the speech of any student group. The Regents submit that the non-discriminatory availability of student fees to all student groups and their utilization by over one hundred is proof that respondents err in arguing that they are being compelled to do something fundamentally dissimilar from funding a traditional public forum.

2. Respondents identify a number of perceived distinctions between a traditional public forum and a *Rosenberger* forum which, in their view, will prevent the floodgates from opening to taxpayer challenges to funding traditional public forums, should their claimed opt out right be recognized (*see* Resp. Br. at 39-44). The argument fails for two reasons. First, it fails to consider any of the similarities between being required to support the creation of a traditional, physical forum and being required to support the creation of a non-spatial, student fee forum. Second, the distinctions respondents put forward are either non-existent or immaterial to First Amendment concerns.

Whether a traditional public forum or a limited, non-spatial public forum is created, the only potential burden is on the conscience of those required to support the creation of the forum. No speech or membership is actually compelled in either case and the speech of the objected-to group is neither attributed to nor perceived as belonging to those compelled to support the forum's creation or maintenance. In both cases, support for the forum is through generally

applicable fees or taxes. In both cases, a person who finds ideas expressed through the forum objectionable has the right to use the forum to express his own views. *See generally* Pet. Br. at 24-36. Government action is most consistent with First Amendment values when in entails the creation of a forum. At a basic level, we disagree with respondents' assertion that "[g]overnment generally cannot use compelled fees to promote the First Amendment . . ." (Resp. Br. at 25).

Respondents argue that a *Rosenberger* forum can be distinguished from a traditional public forum because it is not supported by tax revenues. Respondents' argument would concede that if the less than $4.28 per student distributed as ASM grants (J.A. 134) or the $0.47 per student going to the Campus Women's Center (J.A. 37-38) were funded directly by state tax revenues[3] -- with respondents asked to pay slightly higher tuition or non-allocable fees to make up the difference, respondents would not claim any First Amendment violation (Resp. Br. at 39-40). The imposition of student fees to fund student expression is analogous to the use of general tax revenues in that the revenues are collected on a non-discriminatory basis from all students. This is one of the reasons that the speech of student groups is not perceived as speech of all students.

One difference between fees and taxes that would tend to attenuate any perceived burden on conscience, is the greater degree of voluntariness involved in the decision to attend the University of Wisconsin, as opposed to paying state taxes.

Respondents suggest that many traditional forums -- streets, sidewalks, city parks and public schools -- are constructed for purposes other than the expressive activities

[3]For 1995-96, the Wisconsin Legislature appropriated more than $800 million of state general purpose revenues to the UW System. Wis. Stat. § 20.285 (1995-96).

of private groups (*see* Resp. Br. at 40). This is neither true -- governments also construct auditoriums, convention centers, centers for performing and visual arts -- nor meaningful. If anything, the creation of a forum to promote speech enhances the legitimacy of the governmental expenditure.

Respondents' next distinction between a traditional, physical forum and a non-spatial student fee forum rests on the unsubstantiated claim that "the typical university student fee system gives the student government and the Board of Regents . . . wide discretion to decide which groups will have access to the forum of money" (Resp. Br. at 41). Respondents later write that "[e]ven if objecting students formed an opposing group and applied for funding, the University has total power to reject the application" (*id.*). Neither the district court nor the court of appeals based its decision on this supposed unfettered discretion, and respondents have not identified any part of the record demonstrating its use. As previously discussed, the claim is essentially that the University has failed to create a *Rosenberger* forum, not that respondents have a First Amendment right to opt out of supporting a *Rosenberger* forum where one has been created. *Rosenberger* expressly prohibits a public university from denying fees to student groups based on viewpoint. At bottom, respondents are asserting that "the University has total power to" disregard the holding in *Rosenberger*, which is false.

Respondents' claimed distinction, that a student fee forum involves the consumption of limited resources, is largely correct, but immaterial (*see* Resp. Br. at 42). In *Rosenberger*, the University of Virginia had argued similarly that "funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not." 515 U.S. at 835. Because a state is required "to ration or allocate the scarce resources on some acceptable neutral principle," *id.*, the distinction does not alter the basic constitutional fact that the student fee system results in the

creation of a limited public forum. Moreover, "in any given case this proposition [regarding relative scarcity] might not be true as an empirical matter." *Id.* Use of a traditional public forum can involve the expenditure of significant public resources, as where police must be stationed to protect the speaker or retain order. *See, e.g., Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) ("the opinions which [demonstrators] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection").

Respondents rely on essentially the same distinction in arguing that "[m]any governmental units charge fees to private groups for using physical public forums, such as a public school building" (Resp. Br. at 43). Whether or not this is true, the First Amendment does not require that the cost of using a traditional public forum be charged to the group or individual using it.

D. Mandatory funding of a *Rosenberger* forum furthers the University's compelling interests in extending education beyond the classroom by means that are narrowly drawn to achieve that end.

Even assuming the compelling governmental interest standard applied, the use of student fees to create a *Rosenberger* limited public forum meets that standard. The vital state interests furthered by the funding of a student fee forum lie in the University's ability to offer educational opportunities that extend beyond the classroom and campuses (*see* Wis. Stat. § 36.01(2)), including the opportunity to hear diverse viewpoints, to participate in varied organizations, to receive course credit through internship programs, to bring the ideas of the classroom to the community, to develop one's own voice, to fulfill one's civic duties and to learn tolerance towards the speech of others. Respondents do not offer any evidence to controvert

the University's showing that providing resources for independent student expression is central to the University's educational mission as defined by the Wisconsin Legislature (*see* Pet. Br. at 41-45).

The imposition of a modest student fee, payable by all students, represents means that are "narrowly drawn to achieve that end." *See Widmar v. Vincent*, 454 U.S. 263, 270 (1981).[4] The alternatives respondents offer would result in student groups receiving fewer resources, depending on their level of popular support. This would necessarily result in a diminution in the amount of student speech occurring on the UW-Madison campus. It is not possible to know the full extent of this diminution -- there is nothing in the record attempting to measure the variance in the amount of speech, and respondents' assertions to the contrary are without factual citation and support -- but it is virtually certain to

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[4]Some circuit courts that have applied the compelling state interest standard have found that mandatory student fees are the least restrictive means of promoting a university's compelling governmental interests in the free exchange of ideas, extracurricular life and civic duty. *See Carroll v. Blinken*, 957 F.2d 991, 1001-02 (2d Cir. 1992) ("the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate -- together are substantial enough to justify the infringement of appellants' First Amendment right against compelled speech that occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG. We also believe that these interests would be served less effectively absent the activity fee distribution regulation. . . . [A]n alternate funding scheme would seem less likely to commit the university community to the goals of enriching campus life and promoting debate."); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992) (university's funding of a student-run newspaper is "a narrowly tailored means" of advancing university's educational goals); and *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) ("The University's academic judgment is that the [student news]paper is a vital part of the University's educational mission, and that financing it is germane to the University's duties as an educational institution. . . . It would appear, therefore, that funding by mandatory student fees is the least restrictive means of accomplishing an important part of the University's central purpose, the education of its students."); *but see Southworth v. Grebe*, 151 F.3d 717, 731 n.13 (7th Cir. 1998), Pet.-Ap. 43a n.13.

occur. Moreover, a system of voluntary contributions would give the majority power to determine which speech is funded to a degree that the challenged system never would. An important casualty of an opt out system is the First Amendment value of tolerance for speech with which we do not agree. Because respondents are able to obtain funding for their own student groups, the challenged fee system establishes the means for their responding to, rather than silencing, objectionable speech.

II. ON THE RECORD OF THIS CASE, THE UNIVERSITY OF WISCONSIN MAY, CONSISTENT WITH THE FIRST AMENDMENT, REQUIRE STUDENTS TO PAY FEES USED TO PROVIDE STUDENT SERVICES.

While the speech of GSSF-funded organizations contributes to the atmosphere of inquiry and debate on the UW-Madison campus, the parties stipulated that "[t]he General Student Services Fund provides a source of funds for those services which provide direct, ongoing services to significant numbers of UW-Madison students" (Stip. ¶ 13; Pet.-Ap. 106a). We do not dispute that some GSSF-funded groups engage in some political speech, however respondents' examples frequently rest on disputed facts or incorrect assumptions. Even where political speech has occurred, a number of principles sustain the system of mandatory fee funding at the University of Wisconsin-Madison.

1. The provision of services to a significant number of students represents an important university function. Respondents concede that the University may compel students to support student services, although the scope of such services is left nebulous, ranging from "services that benefit all students," to those regarded as "a legitimate

service," to those which constitute "a service that benefits a broad portion of the student body" (Resp. Br. at 47). The suggestion that services must benefit all students does not have any constitutional basis and would preclude student fee funding for the Student Health Service, the GUTS Tutorial Program, the SAFE Ride Bus and the issuance of Madison Metro bus passes. Otherwise, respondents' concession is an acknowledgement of error, given the stipulation of GSSF funding of direct, ongoing services to significant numbers of students. Respondents again attempt to disavow their stipulation when they assert that "the only 'service' provided by many GSSF-funded groups was advocating their viewpoints to others and urging them to join their causes" (Resp. Br. at 3). In contrast to respondents' claims concerning the Campus Women's Center's lack of services, the record reveals that the Center "provide[s] free child care for student parents by matching volunteers with prospective mothers and fathers and [is] actively involved in the Child Care Tuition Assistance Program" (J.A. 175). It also runs "student facilitated support groups for . . . depression, eating disorders and surviving sexual assault" (*see* J.A. 175). *See also id.* at J.A. 179, ¶ 3 (the Campus Women's Center and Lesbian, Gay, Bisexual Center provide "important sources of support" to student populations and "serve as evidence that they are welcomed to the University community").

Respondents' assertion that "[t]he lower courts were not persuaded by the University's evidence of bare denials by the leaders of the funded groups offered in their affidavits, in light of the overwhelming evidence of their advocacy and activism" (Resp. Br. at 12) is not justified.[5] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are [trier of fact] functions, not those of a judge . . . ruling on a motion

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[5]Respondents' suggestion that the University did not dispute their facts concerning groups is belied by the University's response to plaintiffs' proposed findings of fact, which is reproduced at J.A. 181-235.

for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Respondents' description of the lower courts' rejection of the Regents' factual showing serves only to concede error.

2. To the extent GSSF-funded groups engage in political speech, the record reveals that it is part and parcel of the groups' services. For example, the Wisconsin Student PIRG's GSSF application lists a number of advocacy projects. These include a grass roots campaign to persuade Madison's congressman to support a bill to shift funding from fossil fuel to renewable energy research, an effort to investigate and draw attention to the issue of playground safety, the submission of comments to the Department of Agriculture in support of the Ancient Forest Protection Plan, a canned food drive, and the staffing of a voter education table and hotline (*see* J.A. 350-52). But at the same time Wisconsin Student PIRG provides the opportunity for students to participate in course credit internships (J.A. 172-73, ¶ 4, J.A. 352 (noting 60 internships)).[6] Associate Dean Roger Howard testified in his affidavit that "WISPIRG especially has been effective in helping students identify projects that fit with their academic work in the classroom so that students can experience both service and learning around the same topic" (J.A. 180, ¶ 3).[7]

[6]When an organization is providing hands-on experience for which numerous students can get course credit, it is reasonable that the organization selected have broad campus support.

[7]Many of respondents' facts regarding the political activities of the Wisconsin Student PIRG were disputed in the district court, largely due to confusion between the student and state organizations (WISPIRG) (*see* J.A. 185-92). Respondents did not submit to the district court a proposed finding concerning the Wisconsin Student PIRG's financial support for either the state or national PIRG organizations (*see* J.A. 181-235). Parts of the record relating to this issue are difficult to reconcile without further information not presently included in the record. *Cf.* J.A. 65-66 (Excerpt from student PIRG GSSF Funding Application J.A. 172-73, ¶ 8 ("The Wisconsin State Public Interest Research Group receives no student fees from the University of Wisconsin System") and

3. Some of the "political speech" respondents object to is simply that occurring on a forum provided by GSSF-funded groups. For example, respondents continue to characterize the Women's Center as engaging in abortion rights and other political advocacy (*see* Resp. Br. at 6-7). However, the record establishes that this speech results from the publication of a newsletter "for the expression of ideas important to women, regardless of which side of an issue is being supported" (J.A. 176, ¶ 5). Similarly, the dispute of respondents' continued claims that the UW Greens distributed Ralph Nader campaign literature was noted in our opening brief (*see* Pet. Br. at 11; J.A. 174-177; J.A. 166-67). The use of public university fees to support the publication of one or more campus newspapers differs from *Rosenberger*, which involved funding for multiple student group publications. The use of mandatory fees has nevertheless been consistently upheld out of the realistic recognition that campus newspapers constitute a type of forum, as well as provide a valuable journalistic opportunity to students. *See, e.g., Kania v. Fordham*, 702 F.2d at 477; *Veed v. Schwartzkopf*, 353 F. Supp. 149, 153 (D. Neb. 1973), *aff'd mem.*, 478 F.2d 1407 (8th Cir. 1973); *Larson v. Board of Regents of University of Neb.*, 189 Neb. 688, 204 N.W.2d 568 (1973).

4. As has been discussed, the viewpoint neutral and general availability of ASM funding results in the creation of a *Rosenberger* forum, whose mandatory funding furthers the values of both the First Amendment and public higher education. The record reveals that the event respondents refer to as pro-choice art was funded through an ASM events grant and an Anonymous Fund grant (J.A. 140, J.A. 333, J.A. 338, Bates #s 648-51, R. 19). There is no evidence of GSSF

¶ 13 ("Funds allocated to Wisconsin Student PIRG by the student government are used solely to support the programs of Wisconsin Student PIRG . . .").

funding going to this event. At the same time, the Wisconsin Union Directorate's grant application underscores the fine, and not always tenable, line between political and academic expression. The Co-Director of the Women's History Program supported the Wisconsin Union Directorate's events grant application as being "of particular interest to students working in the areas of women's history and women's studies" (J.A. 336), while the Director of the Women's Studies Research Center agreed to co-sponsor the display (J.A. 337).

5. Where speech is funded by voluntary contributions, students are, in effect, already granted a right to opt out of supporting the speech. The record indicates that the Gay and Lesbian Film festival, which respondents cite as an example of political speech (Resp. Br. at 7), was either self-funded or funded through an ASM grant (J.A. 209-10, ¶35, Bates #s 1340-47, R. 19). Respondents object to providing any financial support for a student group for the sole reason that it engages in political speech with which respondents disagree, even though no funds were used for this purpose. This cannot be the law. *Compare Abood* and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Accepting respondents' view would mean that a member of a labor union who objected to its political advocacy would have a First Amendment right, not simply to avoid funding the objected-to advocacy, but to avoid supporting the union at all.

6. Finally, with neither precedent nor reasoning to support it, respondents propose that the validity of GSSF funding should rest on a judicial determination as to "whether the organization was formed by people joining together to advocate their common ideas collectively, or . . . formed to provide a service that benefits a broad portion of the student body" (Resp. Br. at 47). Respondents make no attempt to show how, under this standard, the judgment of the court of

appeals could be sustained. The standard was not argued below nor relied on by either court.

III. THE ISSUE OF THE APPROPRIATE REMEDY IS NOT BEFORE THIS COURT.

The University believes that the question of the appropriate remedy lies outside the question presented. As in any case, the definition of the substantive right necessarily precedes and informs the issue of remediation.

The Regents are not before the Court as private litigants but as an arm of the State of Wisconsin, claiming the rights of sovereignty, while fully accepting their obligation to conform State policies to the superior requirements of the federal Constitution. Based on principles of comity and federalism, the Seventh Circuit correctly held that an injunction specifying the procedure for complying with a declaration of invalidity was not warranted at this stage of the case (Pet-Ap. 49a-50a). Respondents did not cross-petition for review of this part of the court of appeals' judgment. If the court of appeals' judgment is affirmed in whole or in part, the Regents respectfully submit that the issue of further relief need not be considered at this time.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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